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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 323

J. D. MCCARTY,
Petitioner,

VERSUS

THE UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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September, 1969

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TABLE OF CONTENTS

	PAGE
Jurisdiction	1
Argument	2
Conclusion	6

AUTHORITIES

CASES:

Hibbard v. United States, 172 Fed. 66	4-5
Mann v. United States, 319 F.2d 404 (5th Cir.)	3
McFay v. State, Vol. 40 Okla. Bar Ass'n Journal, p. 1758	5
Sherwin v. United States, 320 F.2d 177 (9th Cir. 1963)	2

MISCELLANEOUS:

Federal Rules of Criminal Procedure, Rule 52(b)	6

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JURISDICTION

The Petition for Writ of Certiorari filed in this case was air expressed from Oklahoma City, Oklahoma, by the printing company at about 2:30 p.m., on July 2, 1969, for delivery to the Clerk of this Court on July 3, 1969. This was well in advance of the July 5, 1969, due date.

On July 8, 1969, a deputy clerk of the Court notified counsel for the petitioner that the petition was being held for filing pending receipt of the certified record of the Court of Appeals for the Tenth Circuit. Telephone conversation, to the Clerk of the Court of Appeals, revealed that a judicial conference in Denver had curtailed work in the office of the Clerk, but the record was forwarded immediately thereafter.

In the initial conversation with the deputy clerk of this Court the deputy clerk indicated that further delay in docketing the petition (i.e., waiting for receipt of the record) was of no consequence since it was not a jurisdictional matter anyway.

Doubtlessly the intervening Memorial Day Holiday caused delay and confusion in the handling of the petition and the presumption could fairly lay that the air express company delivered the petition to the control of this Court on June 3, 1969, as scheduled.

ARGUMENT

The Brief submitted by the Solicitor General in opposition to J. D. McCarty's Petition for a Writ of Certiorari is directed primarily to justifying the following instruction to the McCarty jury:

> "As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted.
>
> "So unless the evidence in this case leads the jury to a different or a contrary conclusion, the jury may draw the inference and find that the accused intended all of the natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any acts knowingly done or knowingly omitted by the accused. [R. 871-872.]"

In support of this argument, the Solicitor General relies most heavily upon the case of *Sherwin* v. *United States*, 1963, 320 F.2d 177 (C.A.9.) In further rationaliz-

ing the case of *Mann* v. *United States*, 319 F.2d 404 (C. A. 5), and this Court's contemporaneous denial of certiorari in both *Sherwin* and *Mann*, despite dissimilar results the Solicitor General states:

> ". . . While the government filed a protective petition in *Mann, it* basically opposed certiorari, on the ground that the correctness of the charges depend so heavily upon the evidence introduced at the trials that there was neither necessary inconsistency in the rulings nor prospect that review in this Court would give further guidance to lower courts. Both petitions were denied.[4] (Footnote omitted)"

Although the Solicitor General is able to distinguish the facts of *Sherwin* and *Mann* and thereby justify the need for different instruction in each, there seems to be a failure to distinguish the facts of *Sherwin* and the instant case in regard to instruction requirements.

In the instant case, not one act of fraud or concealment was proved. The only proof to support conviction was the fact of underreporting income, without any independent proof of an act colored with fraud or concealment such as to justify or support an inference or presumption of criminal intent to defeat the payment of a tax. In the *Sherwin case*, the agent testified that the accused stated that he had only two bank accounts. Sherwin's statement to the agent was proven to be false when the evidence showed that he had at least five other bank accounts, some of which were in fictitious names. ALSO, the unreported receipts were found in the bank accounts not disclosed to the agent.

The distinction which the Petitioner seeks to reveal to this Court is the one between cases in which there is merely proof of underreported income and those in which there are overt acts which, independently of the amount of income reported, bear the color of fraud and bespeak of a criminal intent. This distinction was never more thoroughly understood than by the Court of Appeals for the Seventh Circuit when it stated on rehearing in the case of *Hibbard* v. *United States*, 172 Fed. 66, 73:

> "On Rehearing.
>
> "PER CURIAM. The petition for rehearing is denied. We do not wish, however, that there should be any misunderstanding respecting our holding on the instruction referred to in subdivision 5 of the opinion. Standing by itself, as an abstract proposition of law, the instruction is not erroneous. The error consists in applying it to a case wherein, apart from intent, the act is colorless; color being thereby imparted, not to the intent by the color of the act, as the law implies, but to the act itself by the color borrowed for the intent. In cases like this where the act itself is, apart from the intent, colorless, the color of the intent must be proven as any other element of criminality is proven. The instruction as given (bearing in mind the case to which is was applied), though correct as an abstract proposition of law, tended to confuse the jury upon what, in this case, was the burden on the government, and thereby, in our judgment, prejudiced the plaintiff in error."

Hibbard v. *United States* was a mail fraud case and the instruction spoken to above appeared at page 71 of the opinion and was as follows:

> "The law presumes that every man intends the natural, legitimate and necessary consequences of his

acts. Wrongful acts, knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent. The color of the acts determines the complexion of the intent. The intent to injure or defraud may be presumed upon an unlawful act which results in loss or injury, if proven to have been knowingly committed."

The crime of willfully evading or defeating tax requires proof of specific intent in order to support a conviction. The Oklahoma Court of Criminal Appeals in its recent opinion in *McFay* v. *State*, Vol. 40 Okla. Bar Ass'n Journal, page 1758, August 2, 1969, reviewed the Oklahoma law on proof of specific intent to commit a crime and therein stated:

"This court said in the case of *Ogelsby* v. *State*, Okl. Cr. 411 P.2d 974:

> 'A specific intent is not presumed and conviction cannot be had on the basis of an imputed intent. The general rule, that a criminal intention will be presumed from the commission of the unlawful act does not apply. No intent in law or mere legal presumption differing from the intent in fact, can be allowed to supply the place of proof of the requisite specific intent. 22 C.J.S. Criminal Law, § 32.

Also, in the case of Sullateskee v. State, Okl. Cr. 428 P.2d 736:

> 'In a case wherein specific intent is an element of the crime charged, it is necessary for state to prove such specific intent as an independent fact.'

They said further:

> 'It is incumbent upon the State to prove every essential element of the crime charged by evidence beyond a reasonable doubt, and a conviction based upon evidence which raises merely suspicions will not be allowed to stand.'"

The opinion of the Court of Appeals for the Tenth Circuit and the response of the Solicitor General both champion the view that the instruction complained of did not constitute plain error and that any deficiencies in the instruction short of fundamental error were waived. This, however, in view of a total lack of independent proof of criminal intent, as is required by both the United States decisions and the Oklahoma decisions cannot be reconciled with Rule 52 (b) F.R. Crim. P., as it speaks of defects affecting substantial rights:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Respectfully submitted,

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